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Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL E. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Sixth Circuit's decision that the prosecutor's pronounced and persistent improper remarks during closing argument did not deprive Petitioner of a fair trial conflict with the principles enunciated in this Court's decision in *Berger v. United States*, 295 U.S. 78 (1935) and with the requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution that all criminal trials must be fair?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's convictions is reprinted in the Appendix at App. 1-10. The unpublished "Judgment in a Criminal Case" of the United States District Court for the Northern District of Ohio, Eastern Division, is reprinted in the Appendix at App. 11-20.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 21, 2006. This petition for a writ of certiorari is filed within 90 days of that date, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

The Petitioner, Samuel E. Johnson, was charged in Counts One and Two of an Indictment with aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2). Petitioner Johnson pled not guilty and proceeded to trial before a jury. He was convicted on both counts.

On February 14, 2005, the district court sentenced Petitioner to a term of imprisonment of 30 months as to Counts One and Two to run concurrently, to be followed by a term of supervised release of one year. Petitioner timely filed a notice of appeal. The Court of Appeals affirmed the convictions on February 21, 2006.

II. Statement of Facts

The Government's Case

Federal and State Corporate Advisors, Inc. (hereinafter "F&S") located in Hialeah, Florida, was a business that administered job tax credit programs for large corporations. The Work Opportunity Tax Credit program (hereinafter "WOTC") was one such program. It enabled large corporations to receive a tax credit for each of its employees who had a disadvantaged employment history prior to being hired by the corporation. F&S had 15 to 20 employees.

On April 25, 1996, Jo-Ann Stores, Inc., (hereinafter "Jo-Ann Fabrics") headquartered in Hudson, Ohio, contracted with F&S to have F&S administer the WOTC program on its behalf. F&S' responsibilities included identifying potential employee candidates for the WOTC

program by conducting telephone interviews with them, obtaining written State certifications verifying employees' eligibility for the WOTC program and tabulating monthly WOTC figures. In return for those services, Jo-Ann Fabrics agreed to pay F&S a fee of 15 percent of the WOTC tax credits Jo-Ann Fabrics earned. These commissions were paid directly to F&S by Jo-Ann Fabrics on a monthly basis.

F&S was owned by Brian Eden who was its president. Paul Friedlander was F&S' vice president. Both Eden and Friedlander testified for the government at Petitioner's trial pursuant to plea agreements enabling them to obtain sentence reductions.

At the time that Eden testified at Johnson's trial, Eden was serving a sentence of 37-months imprisonment with the possibility of having his sentence reduced pursuant to a governmental motion under Federal Rule of Criminal Procedure 35. Eden's 37-month sentence was the result of Eden being indicted in three separate federal criminal cases, including this case. In return for pleading guilty and agreeing to testify for the government in this case, Friedlander received a reduced sentence of three years probation and six months house arrest.

As the owner of F&S, Eden's personal monetary benefits increased whenever Jo-Ann Fabrics' WOTC tax credits increased. Friedlander's monetary benefits were also directly linked to the number of WOTC tax credits F&S told Jo-Ann Fabrics to claim. He received a salary of $1,000 per week plus 20 percent of the 15 percent commission earned by F&S on Jo-Ann Fabrics' WOTC tax credits. In contrast, the trial judge made an express finding at Petitioner's sentencing that Petitioner "did not profit"

from the commissions earned by F&S on Jo-Ann Fabrics' WOTC tax credits. Petitioner was merely a salaried employee who received a small Christmas bonus.

Friedlander testified that Eden directly supervised all of the employees at F&S, including Petitioner, and Eden ran the day-to-day operations there. However, Eden directly contradicted Friedlander by testifying that Friedlander was the "de facto president" of F&S who was in charge of overseeing everything at F&S on a day-to-day basis, because Eden only rarely came to the office. Eden and Friedlander also directly contradicted each other at trial when they accused each other of initiating the charged fraud involving Jo-Ann Fabrics. Eden also lied in pre-trial interviews with FBI agents about this case.

At the trial, it was undisputed that Friedlander was the person at F&S who negotiated and signed the contracts between Jo-Ann Fabrics and F&S and who met with representatives of Jo-Ann Fabrics in Hudson, Ohio.

Four other employees of F&S testified for the government at Petitioner's trial. These four employees confirmed that Eden and Friedlander were the two top people at F&S and that Petitioner merely managed the telephone operators whose job it was to interview the new employees of its clients for the WOTC program.

Eden and Friedlander testified that, beginning in 1997 and continuing through 1999, they and other F&S employees created false reports which inflated the number of employees who were eligible for WOTC tax credits and mailed those reports to Jo-Ann Fabrics. Eden testified that it was Friedlander's idea to create false certificates of WOTC eligibility. John Martin, a computer operator at F&S who testified for the government in return for a

promise from the government for complete immunity, testified that he created templates used to make false certificates of WOTC eligibility that were provided to Jo-Ann Fabrics.

Friedlander, Eden and Martin testified that Petitioner was aware that false certificates of WOTC eligibility were mailed to Jo-Ann Fabrics. According to these three witnesses who all had motives to lie, Petitioner provided information to Friedlander and the computer programmers to help them in creating false certifications.

Two of the telephone operators at F&S and a computer programmer there testified that they forged signatures on documents at Petitioner's request but were unable to identify those documents or describe them. They were never told why they were asked to do so. One of these telephone operators testified that it may have been legal and permissible for her to sign documents in this manner. None of these three F&S employees ever reported their alleged forgeries to law enforcement officers until 2004 when they were contacted by law enforcement officers.

Martin who, as previously discussed, received total immunity from prosecution in return for testifying, and Eden, who negotiated a 37-month sentence and a possible further sentence reduction for testifying, claimed that Petitioner asked telephone operators at F&S to forge signatures on certification forms pertaining to WOTC eligibility.

Ann Welki, the corporate director of taxes for Jo-Ann Fabrics, testified that, when the Internal Revenue Service began examining Jo-Ann Fabrics' WOTC tax credits, she started investigating the accuracy of those credits claimed on Jo-Ann Fabrics' tax returns for the periods ending with

the fiscal years of January 30, 1998 and January 30, 1999. Welki compared documents showing the number of employees of Jo-Ann Fabrics who had actually received certifications of WOTC eligibility to the number of employees who F&S had claimed were eligible for those credits and there was a serious discrepancy between those two numbers. According to Welki, for the tax return on the fiscal year ending January 30, 1998, Jo-Ann Fabrics claimed WOTC tax credit was $858,623 when, in fact, the actual WOTC tax credit should have been $100,858. As a result, Jo-Ann Fabrics' tax liability on that return was $492,528.

In addition, according to Welki, for the fiscal year ending January 30, 1999, Jo-Ann Fabrics claimed WOTC tax credit was $1,581,545. However, the actual credit was $175,000. As a result, according to Welki, Jo-Ann Fabrics' tax liability on that return was $914,010. The government never introduced the underlying documents upon which Welki's claim of a discrepancy was based.

On August 18, 1999, Jo-Ann Fabrics terminated its relationship with F&S.

The Defense Case

Petitioner testified on his own behalf and denied any involvement in the false certification process. He explained that, in about early 1998, he became the supervisor of the telephone operators. In 1998, he also received the certifications for WOTC eligibility that came from the States and indicated on the computer that these certifications had been received.

Petitioner testified that Friedlander was solely responsible for client contact, including assembling the documentation pertaining to clients' WOTC eligibility and mailing those documents to the clients.

Petitioner further testified that, on two occasions in 2002, he voluntarily met with law enforcement investigators about this case without an attorney because he had nothing to hide. On both occasions, he stated that he had nothing to do with any falsification of documents at F&S.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted because the Sixth Circuit's decision that the prosecutor's pronounced and persistent improper remarks during closing argument did not deprive Petitioner of a fair trial conflicts with the principles enunciated in this Court's decision in *Berger v. United States*, 295 U.S. 78 (1935) and with the requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution that all criminal trials must be fundamentally fair.

The Prosecutor's Repeated Improper Remarks

In his closing argument, the prosecutor made many references to facts not in evidence. *First*, after the prosecutor told the jury in his opening statement that "the top three management people at F&S have been prosecuted for this crime" and that Petitioner was "the third manager or supervisor" at F&S, he reminded them of that alleged fact during closing argument and then told the jurors that, prior to charging anyone in this case, his office made a

"decision . . . to charge only the three top people in that company (F&S), all of whom were intimately involved or intimately directed this massive fraud." Thus, the prosecutor improperly told the jurors that they could be sure that Petitioner was a major participant who was "intimately involved" in the fraud because his office had already determined that to be true. In addition, the prosecutor made it clear that it was his belief that Petitioner was "one of the top three management people in the company" during his cross-examination of Petitioner.

This statement about the pre-trial charging process not only referred to information never presented to the jury but it exploited the influence of the prosecutor's office when the jury's verdict should have turned only on the evidence, not on the standing of the prosecutor or his office. Indeed, the Sixth Circuit held in this case that, "[t]his remark may have come too close to the line of suggesting that Defendant is guilty merely because he is being prosecuted, and may have constituted improper vouching in a testimonial way by the government attorney." (App. 8). In so holding, the Sixth Circuit noted that, "[w]e have previously found that the 'transgressions of the prosecutor were egregious' where the prosecutor remarked, '[i]f the United States did not believe the defendant was guilty of committing these charges in the indictment . . . this case, of course would never have been presented to you in the first place.' *United States v. Bess*, 593 F.2d 749, 754-55 (6th Cir. 1979)." (App. 8-9).

The prosecutor's comment in this case indicating that the jury should convict Petitioner because charges were brought by his office only against the top three people at F&S involved in the fraud is strikingly similar to the comment of the prosecutor that was condemned in *Bess*,

supra. There, the prosecutor stated twice during closing argument that the government only charged those in the case who it believed were guilty. The *Bess* Court reversed the defendant's conviction stating as follows:

> The transgressions of the prosecutor were egregious. ***First, it is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted*** or has been indicted. The prosecutor's first statement was in patent violation of this rule
>
> * * *
>
> Aside from this, both of the above-quoted statements violate the ***established rule that the personal opinion of counsel has no place at trial***.

593 F.2d at 754 (citations omitted; emphasis added).

Second, in his closing argument, the prosecutor told the jury that Petitioner was motivated because "[h]e was getting paid handsomely for his part in the success of his company" and then pointed out that "we're talking $300,000 this one client [Jo-Ann Fabrics] paid F&S that they shouldn't have paid them. ***Imagine what might have happened with the other clients***." However, there was not a scintilla of evidence at trial that Petitioner was involved in tax frauds involving other clients. The law is clear that counsel cannot misstate evidence. *See, e.g., United States v. Young*, 470 U.S. 1, 9-10 (1985); *United States v. Carter*, 236 F.3d 777, 784 (6th Cir. 2001).

The Sixth Circuit acknowledged in this case that this remark was improper and stated:

> We are . . . troubled by the potential impropriety of the government's reference to the fact that

> there were tax frauds involving other clients, and the statement, "Imagine what might have happened with other clients." (J.A. at 146.) Even though Eden testified [t]hat he had been indicted in Pennsylvania for a fraud involving Rite Aid, there was no evidence presented at trial that Defendant was involved in tax frauds involving Rite Aid or any other clients. The only allegations against Defendant in this trial were those involving Jo-Ann Fabrics, so it may have been somewhat improper for the government to make the comment.

(App. 9-10). This comment regarding other tax frauds was patently prejudicial because it improperly and misleadingly bolstered the prosecutor's argument that Petitioner's rapid financial success at F&S was directly related to his facilitation of fraudulent activities involving multiple clients of F&S – not just Jo-Ann Fabrics – when there was not a scintilla of evidence to support such a comment.

Third, government witness Brian Eden, the owner of F&S, testified that only the government had the power to reduce his sentence pursuant to Federal Rule of Criminal Procedure 35 and, although it was possible for him to get such a reduction, he had never been promised one. During the prosecutor's closing argument, the prosecutor, in attempting to convince the jury that Eden was testifying truthfully despite the fact that he hoped to obtain a Rule 35 sentence reduction, stated as follows:

> Do you think for a minute he's going to get up there now and lie and subject himself to a potential perjury charge? For what? Because he hopes to get a Rule 35? That's the sentence reduction. He hopes the government and his sentencing Judge will somehow find it in their

> hearts that he deserves to get a sentence reduction.
>
> He said himself, yeah, he wants it. ***Well, I want to win the lottery, but I don't think that's going to happen any more than anything else around here.***

Thus, the prosecutor told the jury that the government would not be filing a Rule 35 motion to reduce Eden's sentence. This was a fact that plainly was not in evidence and was designed to personally assure the jury that Eden had absolutely no motive to testify falsely for the government. This remark also not only improperly referred to facts not in evidence but clearly constituted improper vouching.

The Sixth Circuit in this case held that, "[a]lthough the government's remarks here [that the Rule 35 sentence reduction was not going to happen] may have been melodramatic, they were a permissible response to defense counsel's attempts to use the potential for a Rule 35 sentence reduction to attack Eden's credibility, and were not improper." (App. 7). However, these remarks of the prosecutor were plainly improper because, "[i]t is . . . improper for a prosecutor during closing argument to bring to the attention of the jury any purported facts that are not in evidence and are prejudicial." *E.g., Macias v. Makowski*, 291 F.3d 447, 452 (6th Cir. 2002). *See also Young*, 470 U.S. at 9-10. In stating that the government was not going to file a motion for a reduction of Eden's sentence, the prosecutor plainly told the jury that evidence not presented to the jury but known to the prosecutor supported Eden's credibility. Defense counsel's cross-examination of Eden about the fact that the government had the power to reduce his sentence and that Eden would

like such a sentence reduction was proper cross-examination which in no way invited the prosecutor to improperly assure the jury that the government would not be attempting to secure a reduction in Eden's sentence in the future.

Finally, the prosecutor made the following comments:

> This isn't a finger pointing kind of thing. They were all in this together. They you[sic] knew they did it, all knew it was wrong. ***Today, seven years later, this is the only person not admitting what he did was wrong. He continues to lie, just as he lied to the agents a couple years ago. Now he's lying to you.***

The prosecutor's expression of his personal sentiment that Petitioner was a liar without reference to any discrepancies between Petitioner's testimony and other documents and testimony or evidence was improper. *See United States v. Francis*, 170 F.3d 546, 551-52 (6th Cir. 1999) (reversing conviction where, *inter alia*, prosecutor asserted that defendant was lying during her closing argument without explaining that this assertion was based upon discrepancies between the evidence and the defendant's testimony).

The Sixth Circuit in this case held that, because former F&S employees testified that Petitioner had engaged in alleged illegal activity and because Petitioner testified to the contrary at the trial, the government's remarks "[a]rguably reflect reasonable inferences from evidence adduced at trial, and it was not improper for the government to suggest that Defendant was lying." (App. 8). However, at no point during the prosecutor's closing argument did the prosecutor ever assert to the jury that

his basis for saying that Petitioner was lying was the testimony of the former F&S employees. Therefore, the prosecutor's expression of his personal sentiment that Petitioner was a liar without explaining that this sentiment was based upon discrepancies between Petitioner's testimony and the testimony of former F&S employees was improper.

The Sixth Circuit held that these pronounced and repeated improper remarks were not plain error in light of "overwhelming evidence of Defendant's guilt." (App. 5). However, in so ruling, the Sixth Circuit ignored this Court's words in *Berger v. United States*, 295 U.S. 78, 88-89 (1935) where this Court reversed defendant's conviction and condemned a prosecutor's improper argument to the jury, stating:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
>
> * * *
>
> He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently,

> improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.
>
> * * *
>
> In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.

These legal principles enunciated in *Berger* were violated in this case and mandate a finding of plain error. This is especially so since the evidence at trial was not strong as it was based upon the credibility of the government's three key witnesses, Eden, Friedlander and Martin, all of whom had motives to lie in order to avoid substantial terms of imprisonment. Indeed, all of the former F&S employees who testified admitted their involvement in the crime. Since "[c]riminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law" – including "lying, committing perjury, manufacturing evidence [and] soliciting others to corroborate their lies with more lies" – juries are entitled to, and frequently do, reject their testimony:

> Ordinary decent people are predisposed to dislike, distrust, and frequently despise criminals who "sell out" and become prosecution witnesses. Jurors suspect their motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable, openly expressing disgust with the prosecution for making deals with such "scum."

The. Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 Hastings L.J. 1381, 1382, 1385 (1996). For this reason, courts in a variety of

contexts have rejected harmless error claims where prosecutors have made improper closing arguments and defendants' convictions rested on such testimony. *See, e.g., United States v. Hands*, 184 F.3d 1322, 1331-32 (11th Cir. 1999) (prosecutor's improper closing argument not harmless where the government's case rested on witnesses of "highly questionable credibility") (citations omitted); *United States v. Blakey*, 14 F.3d 1557, 1560-61 (11th Cir. 1994) (rejecting the government's attempt to avoid reversal for improper closing argument where case rested on witnesses who "possessed motives to lie").

In sum, the pronounced and repeated improper statements by the prosecutor during closing argument carried "much weight against the accused." *Berger*, 295 U.S. at 88. They denied Petitioner the most fundamental of all rights in a civilized society – the due process right to a fair trial. They were plain error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Miami, Florida
May 22, 2006

Respectfully submitted,

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No. 05-3250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAMUEL E. JOHNSON,

Defendant-Appellant. /

ON APPEAL FROM THE UNTIED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Filed Feb. 21, 2006)

BEFORE: COLE, CLAY and GIBBONS, Circuit Judges.

CLAY, Circuit Judge. Defendant, Samuel Johnson, appeals his conviction for aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2), arguing that the government's remarks at trial were improper and constituted reversible error. For the reasons set forth below, we **AFFIRM** Defendant's conviction.

I.

Federal & State Corporate Advisors, Inc. ("F&S") was a business organized for the purpose of administering job tax credit programs for large corporations. These are federal government programs that offer corporations incentives to reduce their tax burden. The Work Opportunity Tax Credit Program ("WOTC"), authorized by the Small Business Job Protection Act of 1996, is one such

program that enables a large corporation to receive a tax credit for each of its employees who had a disadvantaged employment history prior to being hired by the corporation.

On April 25, 1996, Fabrey-Centers of America, operating as Jo-Ann Stores, Inc. ("Jo-Ann Fabrics"), headquartered in Hudson, Ohio, contracted with F&S to have F&S administer the WOTC program on its behalf. F&S's responsibilities included identifying potential employee candidates for the WOTC program, obtaining written state certifications verifying employees' eligibility for the WOTC program, and tabulating monthly WOTC figures. Jo-Ann Fabrics agreed to pay F&S a fee of 15% of the WOTC tax credits taken by Jo-Ann Fabrics. These commissions were paid by Jo-Ann Fabrics to F&S on a monthly basis. The contract between F&S and Jo-Ann Fabrics began in April 1996 and continued until August 1999 when Jo-Ann Fabrics terminated the relationship.

As a result of fraudulent information provided by F&S, Jo-Ann Fabrics claimed WOTC tax credits in the amount of $858,623.00 on its tax return for tax filing year 1997, fiscal year end 1998; and $1,581,545.00 on the return for tax filing year 1998, fiscal year end 1999. An investigation initiated by a suspicious Jo-Ann Fabrics revealed the fraud, and Jo-Ann Fabrics eventually corrected those tax returns by filing amended returns with the IRS and reducing its claimed WOTC credits to about $100,858 and $175,000, respectively, for the two years in question.

Defendant was one of several F&S employees who was indicted for his involvement in the fraudulent tax credit scheme. Defendant was charged in the United States

District Court for the Northern District of Ohio with two counts of aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2). Defendant pled not guilty and proceeded to a jury trial. Six F&S employees testified at Defendant's trial on behalf of the government, including Brian Eden, owner of F&S, and Paul Friedlander, vice-president of F&S, both of whom had previously been indicted for the WOTC tax credit fraud, and who were already serving sentences for these crimes. Four other former F&S employees also testified, including Deborah Kiniry and Elizabeth Benavides, two telephone operators, and Jon Martin and Eugene Rosenfeld, information technology ("IT") specialists.

All of the employees testified about their involvement in the production of false WOTC statements and implicated themselves, each other, and Defendant in the scheme. Both Friedlander and Eden testified that Defendant was the vice-president of WOTC, responsible for overseeing the operators who determined which people were eligible for WOTC credits, processing the paperwork, and coordinating with the state. Friedlander also testified that Defendant was directly involved in cutting and pasting names and social security numbers on tax credit certification forms in order to make "the forms look real." (J.A. at 70.) According to Friedlander, Defendant also directed his subordinates to fraudulently prepare the credits.

The telephone operators also testified that Defendant participated in the fraud, and that Defendant, as supervisor of the telephone operators, directed the operators to do so as well. One operator, Kiniry, testified that Defendant would regularly instruct her to duplicate and forge an individual's signature on certification forms. Another

operator, Benavides, also testified that Defendant asked her to forge signatures. IT specialist Martin testified that he observed Defendant asking operators to forge signatures on certification forms.

Defendant testified on his own behalf and denied any involvement in the false certification process, but Defendant was convicted of both counts on February 14, 2005, and was sentenced on February 16, 2005, to thirty months imprisonment and one year of supervised release. Defendant filed his timely notice of appeal on February 22, 2005.

II.

Whether remarks by a prosecutor amount to prosecutorial misconduct and whether they render a trial fundamentally unfair are mixed questions of law and fact that are reviewed *de novo*. *United States v. Francis*, 170 F.3d 546, 549 (6th Cir. 1999). We review only for plain error, however, "[w]here, as here, a criminal defendant has failed to object below." *U.S. v. Emuegbunam*, 268 F.3d 377, 406 (6th Cir. 2001). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Id.* (quoting Fed. R. Crim. P. 52(b)). To establish plain error, a defendant must show that: (1) an error occurred in the district court; (2) the error was obvious or clear; (3) the error affected defendant's substantial rights; and (4) this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Kingsley*, 241 F.3d 828, 835-36 (6th Cir. 2001). The plain error doctrine mandates reversal in exceptional circumstances and only where the error is so plain that the trial judge

and prosecutor were derelict in countenancing it. *United States v. Carroll,* 26 F.3d 1380, 1383 (6th Cir. 1994).

III.

Defendant claims that the government, during its closing statement, made numerous improper remarks which deprived him of a fair trial in violation of his due process rights. We believe, however, that even if some of the alleged remarks were arguably improper, they were not flagrant and were unlikely to have affected Defendant's substantial rights when viewed in the context of overwhelming evidence of Defendant's guilt.

When reviewing claims of prosecutorial misconduct, we must first determine whether the statements were improper. *Carroll,* 26 F.3d at 1387; *see also United States v. Carter,* 236 F.3d 777, 783 (6th Cir. 2001). If they were improper, then we look to see if they were flagrant and warrant appeal. *Carroll,* 26 F.3d at 1389-90; *Francis,* 170 F.3d at 549.

> To determine flagrancy, the standard set by this Court is: 1) whether the statement tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.

Francis, 170 F.3d at 549-50 (citations omitted).

We can find no impropriety in most of the statements made by the government during the closing argument about which Defendant complains. In particular, it was not improper for the government to make statements

regarding the likelihood that Eden, the owner of F&S who was already indicted and incarcerated, would receive a Rule 35 sentence reduction for testifying against Defendant. This Court has held with respect to plea agreements that "[t]he prosecutor may elicit testimony about its terms, attack the credibility of the witness because of it and even refer to the plea agreement of a government witness in an attempt to deflect defense counsel's uses of the agreement to attack the witness's credibility." *Francis,* 170 F.3d at 550 (citing *United States v. Monroe,* 943 F.2d 1007 (9th Cir. 1991)). "The potential for impropriety emerges, however, when a prosecutor explains that there is to be a recommendation to the witness's sentencing court whether the terms of the plea agreement have been adhered to." *Id.*

In the present case, the government's attorney had asked Eden during direct examination whether or not Eden received any sentencing reduction for testifying, to which Eden replied "no." On cross examination, defense counsel sought to challenge this assertion by asking Eden whether it was his understanding that "even after all that, with no deals on the table, with no promises being made . . . that the government . . . after your testimony today, can still come before the judge that sentenced you and say, hey, judge, we think that Mr. Eden should get a reduction in sentence." (J.A. at 88.) In response to that question, Eden conceded that he would like to get out of prison. During its closing, the government attorney rebutted this testimony and sought to affirm Eden's credibility as a witness to the jury by stating,

> Do you think for a minute he's going to get up there now and lie and subject himself to a potential perjury charge? For what? Because he hopes to get a Rule 35? That's the sentence reduction.

> He hopes the government and his sentencing Judge will somehow find it in their hearts that he deserves to get a sentence reduction. He said himself, yeah, he wants it. Well, I want to win the lottery, but I don't think that's going to happen any more than anything else around here.

(J.A. at 148-49.) Although the government's remarks here may have been melodramatic, they were a permissible response to defense counsel's attempts to use the potential for a Rule 35 sentence reduction to attack Eden's credibility, and were not improper.

There was also no impropriety in the government's statement that Defendant was lying to the jury, assuming there was a reasonable evidentiary basis for the government to make such a statement. The government told the jury that Defendant was "the only person not admitting what he did is wrong. He continues to lie, just as he lied to the agents a couple years ago. Now he's lying to you." (J.A. at 147.) If a defendant testifies, a prosecutor may attack his credibility to the same extent as any other witness. *Francis,* 170 F.3d at 551. "This court has held that a prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony." *Id.* (citing *United States v. Veal,* 23 F.3d 985, 989 (6th Cir. 1994)). "To avoid improprieties, however, such comments must 'reflect reasonable inferences from the evidence adduced at trial.'" *Id.* (quoting *United States v. Goodapple,* 958 F.2d 1402, 1409-10 (7th Cir. 1992)) (finding that because the defendant took the stand, it was not improper for the prosecutor to question his credibility, but it was improper for the prosecutor to utter personal sentiments in front of the jury with no explanation or indication of

evidentiary bases). "Misconduct occurs when a jury could reasonably believe that the prosecutor was, instead, expressing a personal opinion as to the witness's credibility." *Id.*

In the present case, Defendant testified on his own behalf; therefore the government was permitted to suggest to the jury that Defendant was lying so long as the government referred to evidentiary bases for this assertion. The record reveals that the government made these comments regarding Defendant's truthfulness in reference to extensive comments about witness testimony, in which all of the former F&S employees who testified admitted that they had been involved in the fraud, and also all testified that they had either witnessed Defendant engage in alleged illegal activity, or had been directed to engage in alleged illegal activity by Defendant. Based upon such testimony and because Defendant testified, the government's remarks arguably reflect reasonable inferences from evidence adduced at trial, and it was not improper for the government to suggest that Defendant was lying.

We do have some reservations, however, about some of the government's remarks to the jury, especially the government's comment that the decision had been made "to charge only the three top people in that company, all of whom were intimately involved or intimately directed this massive fraud." (J.A. at 142.) This remark may have come too close to the line of suggesting that Defendant is guilty merely because he is being prosecuted, and may have constituted improper vouching in a testimonial way by the government attorney. We have previously found that the "transgressions of the prosecutor were egregious" where the prosecutor remarked, "[i]f the United States did not believe the defendant was guilty of committing these

charges in the indictment . . . this case, of course, would never have been presented to you in the first place." *United States v. Bess,* 593 F.2d 749, 754-55 (6th Cir. 1979).

In the case before us, the government's statement about having charged only the three top people in the company may have been appropriate in order to present the jury with the government's explanation as to why all the employees who were implicated in the fraudulent activities were not also indicted. On the other hand, however, we believe that the government could have made its point without referencing the fact that Defendant and the other managers were specifically charged because they were "intimately involved in the fraud." Regardless of whether this statement was improper, however, we would still find, on plain error review, that the remark was not flagrant or repetitive and did not violate Defendant's substantial rights, in light of the overwhelming evidence of Defendant's guilt which was presented to the jury. *See Carroll,* 26 F.3d at 1383.

We are similarly troubled by the potential impropriety of the government's reference to the fact that there were tax frauds involving other clients, and the statement, "Imagine what might have happened with the other clients." (J.A. at 146.) Even though Eden testified [t]hat he had been indicted in Pennsylvania for a fraud involving Rite Aid, there was no evidence presented at trial that Defendant was involved in tax frauds involving Rite Aid or any other clients. The only allegations against Defendant in this trial were those involving Jo-Ann Fabrics, so it may have been somewhat improper for the government to make the comment. Again, however, on plain error review where Defendant failed to object below, we do not find that this

remark was flagrant or that it affected Defendant's substantial rights.

IV.

In conclusion, we find that the government's remarks during closing arguments did not constitute reversible error that affected Defendant's substantial rights, and we therefore **AFFIRM** Defendant's conviction.

UNITED STATES DISTRICT COURT

NORTHERN District of OHIO

UNITED STATES OF AMERICA

V.

SAMUEL E. JOHNSON

JUDGMENT IN A CRIMINAL CASE

(Filed Feb. 16, 2005)

Case Number: 5:04CR385-001

USM Number: 39782-060

Yale L. Galanter
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1&2 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
26 USC 7206(2)	Aiding and Assisting in Preparation of False Tax Returns	10/14/98	1&2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

FEBRUARY 14, 2005
Date of Imposition of Judgment

/s/ Patricia A. Gaughan
Signature of Judge

Patricia A. Gaughan,
United States District Judge
Name and Title of Judge

2-16-05
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

30 MONTHS as to Counts 1 & 2 to run CONCURRENT. DEFENDANT GIVEN CREDIT FOR TIME SERVED.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends commitment at the FCI in the South Florida area.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The execution of the sentence is deferred and bond continued. The defendant shall surrender:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal or the designated institution.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

1 YEAR

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful

use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

_X_ The defendant shall provide the probation officer with access to any requested financial information.

___ The defendant shall not incur new credit charges or open additional lines of credit without the approval of the Probation Officer.

___ The defendant shall reside in a community treatment center, halfway house, or similar facility of a period of ___ days/months to begin not later than _____. (Work/medical release privileges granted).

___ The defendant shall participate in the Home Confinement Program (with/without) electronic monitoring for a period of ___ day/months, beginning no later than ___ calendar days from release from custody. The defendant is required to remain

at residence unless given written permission to be elsewhere. The defendant may leave residence to work, to receive medical treatment and to attend religious services. The defendant shall wear an electronic monitoring device, follow electronic monitoring procedures and submit to random drug/alcohol test as specified by the Probation Officer. The defendant may participate in the Earned Leave Program. The defendant (is/is not) to pay the cost of the program. Payment is to be made as directed by the Supervising Home Confinement Officer.

___ The defendant shall participate in an outpatient program approved by the U.S. Probation Office for the treatment of alcohol and/or drug dependency which will include testing to determine if the defendant has reverted to the use of alcohol and/or drugs.

___ The defendant shall participate in an outpatient mental health treatment program as directed by the Probation Office.

___ The defendant shall surrender to U.S. Immigration and Naturalization Service for deportation as provided by law, and shall not illegally re-enter or remain in the United States.

___ The defendant is committed to the custody of the Bureau of Prisons for months. It is recommended that the Comprehensive Sanctions Center be designated as the place of confinement.

___ The defendant shall not associate with any members of the ___ gang or any other gang or threat group as directed by the probation officer.

___ The defendant shall consent to the U.S. Probation Office conducting periodic unannounced examinations of computer system(s), which may include

retrieval and copying of all memory from hardware/software and/or removal of such system(s) for the purposes of conducting a more through [sic] inspection and will consent to having installed on your computer(s), at your expense, any hardware/software to monitor your computer use or prevent access to particular materials. The defendant consents to periodic inspection of any such installed hardware/software to insure it is functioning properly.

___ The defendant shall provide the U.S. Probation Office with accurate information about his/her entire computer system (hardware/software); all passwords used by you; and your Internet Service Provider(s) and will abide by all rules of the Computer Restriction and Monitoring Program.

___ The defendant shall submit his/her person, residence, place of business, computer, or vehicle to a warrantless search, conducted and controlled by the U.S. Probation Officer at a reasonable time and in a reasonable manner based upon reasonable suspicion of contraband or evidence of a violation of a condition of release, failure to submit to a search may be grounds for revocation, the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

___ The defendant shall perform hours of community service as directed by the Probation Officer.

___ The defendant shall participate in, and successfully complete, a cognitive restructuring program as instructed by your Probation Officer.

___ The defendant shall reside and participate in a residential drug treatment program as instructed by your Probation Officer, until discharged by the facility and as approved by your Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ _____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

ADDITIONAL RESTITUTION PAYEES

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.